UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
THOMAS R. LEVEQUE, JR. and	)	CASE NO. 02-31150 HCD
REGINA LYNN LEVEQUE,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
J. JOHN MARSHALL and	)	
MARJORIE F. MARSHALL,	)	
PLAINTIFFS,	)	
vs.	)	PROC. NO. 02-3049
	)	
THOMAS R. LEVEQUE, JR. and	)	
REGINA LYNN LEVEQUE,	)	
DEFENDANTS.	)	

Appearances:

John William Davis, Jr., Esq., attorney for plaintiffs, Davis & Roose, 116 East Clinton Street, Goshen, Indiana 46528; and

Katherine McGrath, Esq., McGrath & Velazquez, attorney for defendant, 108 North Main Street, Suite 620, Elkhart, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 16, 2003.

Before the court is the Motion for Summary Judgment filed on March 20, 2003, by the plaintiffs J. John Marshall and Marjorie F. Marshall ("creditors" or "plaintiffs") against the defendants Thomas R. LeVeque, Jr. and Regina Lynn LeVeque ("debtors" or "defendants"). They seek a summary judgment of their Objection to Discharge of Debtors, which alleged that the discharge should be denied to these debtors pursuant to 11 U.S.C. § 727(a)(5) because they had failed to explain satisfactorily their loss or deficiency of assets to meet their obligations. The defendants filed an answer to the Objection to Discharge, and both parties have filed briefs

in response to the summary judgment motion. For the reasons that follow, the court denies the plaintiffs' Motion for Summary Judgment and Objection to Discharge of Debtors.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The creditors are contract vendors of seven parcels of real estate which the debtors were purchasing in installment sale contracts. The debtors defaulted on the contracts. The creditors, as plaintiffs, obtained a final judgment in Elkhart Superior Court with respect to two of the contracts; they obtained a finding of default but not a final money judgment with respect to the remaining contracts. The state court appointed a receiver to take charge of five of the properties on November 2, 2001; the receiver was named to handle two more properties on January 2, 2002. The debtors filed a voluntary chapter 7 petition in bankruptcy on March 6, 2002. The creditors initiated this adversary proceeding by filing an objection to the debtors' discharge on June 3, 2002.

In their Objection to Discharge of Debtors, the creditors stated that they were secured to the extent of the foreclosure value of the property and receiver's collections, but were unsecured to the extent that those proceeds were insufficient to pay all of the LeVeques' contract obligations. They asserted that the debtors failed to report, in their Statement of Financial Affairs and schedules, specific assets: (a) numerous suits to which they

were parties as plaintiffs, (b) their interest in real estate on 5th Street in Elkhart, and (c) a theft loss which occurred within one year preceding the filing of their bankruptcy petition. They also alleged that the debtors failed to explain satisfactorily the disposition of two other real estate holdings, one on Bertrand Street in South Bend, Indiana, and the other on Washington Street in Elkhart, Indiana. Three days before the objection was filed, the debtors had filed Amended Schedule C (to claim the homestead exemption) and an Amended Statement of Financial Affairs (to add 2001 rental income, 2000 recovery of debtors' judgments against tenants, 5 uncollectible old judgments against tenants, property held in receivership, and theft loss of $1,500).

The debtors answered, generally denying that they have assets available to meet their obligations. They specifically denied any ability to collect the judgments against past tenants, any interest in the real estate on 5th Street, and any theft loss in the year before the bankruptcy. They explained that they had surrendered their interest in the Bertrand Street property to the mortgage company. They also stated that the Washington Street property has a mortgage lien and a judgment lien against it that far exceeded the market value of the property, and claimed that they have no equity in the property.[1]

The court conducted a telephonic pre-trial conference on the plaintiffs' objection to the defendants' discharge, held an evidentiary hearing on the valuation of the defendants' four vehicles, and then allowed the parties thirty days to file dispositive motions.

The plaintiffs filed a motion for summary judgment on March 20, 2003. They alleged that the debtors' total assets were in the amount of $950,272.02, rather than $211,135.00, and therefore that the debtors had understated their total assets by $739,137.02. To illustrate their claim that the debtors' assets were unreported or under-reported, the plaintiffs presented a lengthy list of "representations" and "facts": They listed as "representations" the assets reported by the debtors in their bankruptcy documents – in their verified Statement

[1] The record reflects that, by its Order of August 26, 2002, the court authorized the trustee to abandon the real estate on Washington Street to First Federal Savings Bank. *See* R. 33.

of Financial Affairs, schedules, and amended filings – and as "facts" the assets subsequently disclosed by the debtors or proven by the plaintiffs. The plaintiffs alleged that the defendants failed to explain satisfactorily their losses or deficiencies of assets, and suggested that they concealed assets. They also argued that the debtors' petition and other filings contained substantial omissions and misstatements that were not mere mistakes. They asked the court to deny the debtors' discharge.

Discussion

The issue before the court is whether the plaintiffs' complaint objecting to discharge should be determined by means of summary judgment. This court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202 (1986). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Section 727 of the Bankruptcy Code requires the court to grant the debtor a discharge unless he falls into any of its ten subsections. The plaintiffs claim that § 727(a)(5) authorizes the denial of discharge for these debtors because they have "failed to explain satisfactorily, before determination of denial of discharge under this

paragraph, any loss of assets or deficiency of assets to meet the [debtors'] liabilities." 11 U.S.C. § 727(a)(5). The burden is on a creditor to prove its complaint objecting to discharge. *See* Fed. R. Bankr. P. 4005. It must show that "the debtor at one time owned substantial and identifiable assets that are no longer available for his creditors." *Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 364 (Bankr. N.D. Ill. 2002) (citing cases). It also may meet its initial burden by showing "that a debtor has listed assets in his schedules at a lower figure than he has previously presented himself to be worth, or where there was an unusual and unexplained disappearance of assets shortly before the debtor filed bankruptcy." *PNC Bank v. Buzzelli (In re Buzzelli)*, 246 B.R. 75, 116 (Bankr. W.D. Pa. 2000) (quoting *Ernst v. Walton (In re Walton)*, 103 B.R. 151, 155 (Bankr. S.D. Ohio 1989)).

Once the party objecting to the discharge meets this burden, then the debtor is obligated to provide a satisfactory explanation for the loss. *See In re Bostrom*, 286 B.R. at 364. The court must find the explanation satisfactory and not just "a vague, indefinite, and uncorroborated hodgepodge of financial transactions." *Baum v. Earl Millikin, Inc. (In re Baum)*, 359 F.2d 811, 814 (7th Cir. 1966). The court focuses on the truth, detail and completeness of the debtors' explanation of loss rather than the wisdom of their disposition of assets. *See In re D'Agnese*, 86 F.3d 732, 735 (7th Cir. 1996). The ultimate burden of proof, however, remains with the party objecting to discharge. *See First Federated Life Ins. Co. v. Martin (In re Martin)*, 698 F.2d 883, 887 (7th Cir. 1983). Generally, the court must construe objections to discharge strictly against the creditors and liberally in favor of the debtor to promote the Code's "fresh start" policy. *See Village of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir. 2002). And yet, the court also "must recognize that a discharge in bankruptcy is a privilege, not a right, and should only inure to the benefit of a debtor with substantially accurate and complete records of its financial affairs so that creditors can be assured that only honest debtors receive discharges." *First Commercial Fin'l Group v. Hermanson (In re Hermanson)*, 273 B.R. 538, 545 (Bankr. N.D. Ill. 2002) (citing *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996); *Bay State Milling Co. v. Martin (In re Martin)*, 141 B.R. 986, 995 (Bankr. N.D. Ill. 1992)).

Courts often are reluctant to rule on denials of discharge by summary judgment, without permitting the debtors to testify. *See, e.g., United States v. Lenard (In re Lenard)*, 140 B.R. 550, 555 (D. Colo. 1992) (listing cases). Such cases often involve issues of fraudulent intent or material questions of fact that should be determined by a trier of fact. In this case, however, the court finds that the parties agree on the relevant facts, despite the monetary differences cited by the plaintiffs. The court determines that summary judgment is an appropriate vehicle for resolution of the issues.

The plaintiffs alleged that the debtors' original petition, statement of financial affairs, and schedules omitted or understated assets and income of the debtors. To demonstrate this claim, the plaintiffs presented a list of the debtors' assets. They then listed, in the first column, the values of those properties as the debtors presented them in their bankruptcy schedules and, in the second column, the valuations "proven" by the plaintiffs. The plaintiffs asserted that the evidence demonstrated "that the LeVeques understated their total assets by $739,137.02." R. 27 at 12. By relying on § 727(a)(5), the plaintiffs alleged that the debtors had substantial and identifiable assets that are no longer available for their creditors. The court has examined the plaintiffs' evidence as it was presented by them.

1. Real Property

First, the plaintiffs asserted that the debtors understated their real property significantly, by $662,000: The debtors' real estate total valuation, under Schedule A, was $168,500, and the creditors' total valuation was $830,500. The debtors had reported the values of certain properties of real estate as "unknown." The land contract vendors of those properties are the plaintiffs. Mr. Marshall, by affidavit, supplied the "proven" values – the exact amount owed to the plaintiffs on the date the bankruptcy petition was filed, and the current market value.

The court finds that, with respect to each of these "Marshall properties," the parties differ on two valuations: (a) the amount of the debt, as of the date of the bankruptcy petition, and (b) the current market value.

The court finds, initially, that the difference between the plaintiffs' and the defendants' accounting of the amount of debt owed is one of exactitude. The defendants presented a rounded figure, such as $49,000, and the plaintiffs presented an exact amount, $52,495.20. In light of the fact that the debtors' real properties were surrendered to the plaintiffs, the court finds that the valuation differences are immaterial and do not warrant a denial of discharge.

The second difference lies in the handling of the valuation of the "Marshall properties" on the date of the bankruptcy filing. Mr. Marshall, in his affidavit, stated a current market value for each of the properties.[2] The debtors claimed that the value was "unknown." The plaintiffs, by specifying the market value for each property, claimed that the debtors failed to disclose a total amount of $570,000 in assets. It is clear from the record, however, that the debtors did not intend to suggest that the properties had no value. At the § 341 meeting, the debtor Thomas LeVeque stated that he was surrendering his interest in all pieces of property except his personal residence because he could not make the payments. His position was that he put substantial improvements into the property but that he was not receiving enough rental income from them. He specifically identified the properties that the plaintiffs had sold to him by land contract and testified that he believed the potential value of the Marshalls' properties was worth less than the liens. *See* Defs' Ex. A at 3-4, 8-9. Mr. Marshall questioned the debtors at that time. At the end of the § 341 meeting, the Trustee asked, "So there really

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[2] The court declines to give weight to the current market values provided by J. John Marshall in his affidavit. Mr. Marshall, as the homeowner, with "familiarity with Multiple Listing Service reports and [] frequent communications with real estate agents and brokers and other landlords involved in similar transactions," *see* Affidavit at 2, was competent to given his inexpert opinion as to the value of his own real estate. However, the court will not assign much weight to a self-serving, even if well-intentioned, affidavit valuing of the creditor's own properties. Courts have found that such a declaration, standing alone, is not probative of value. *See In re Hermanson*, 273 B.R. at 549-50; *In re 234-6 West 22nd St. Corp.*, 214 B.R. 751, 758 (Bankr. S.D.N.Y. 1997). This court will not base a denial of discharge on it. The court notes, as well, that the Marshalls have argued in this adversary proceeding that the debtors did have equity in the properties; however, in their Motion for Relief from Stay and Abandonment they argued that the debtors had no equity in the properties. In the view of this court, they cannot have it both ways.

is no equity in any of those properties, they are all in receivership anyway?" The debtors responded: "Yes, they all go back to him [Mr. Marshall], yes."[3] Defs' Ex. A at 11. The Trustee then adjourned the § 341 meeting.

The court considers first the debtors' decision not to place a value on those properties. A debtor has a duty to prepare bankruptcy schedules completely and accurately and to list dollar valuations for each asset. *See Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001) (citing cases). "If faced with a range of values, he was to 'choose a value in the middle of the range.'" *Id.* (*citing In re Seruntine*, 46 B.R. 286, 288 (Bankr. C.D. Cal. 1984)). However, when there are assets of unknown value, "'a simple statement to that effect' will suffice." *Id.* (*citing In re Wenande*, 107 B.R. 770, 772 (Bankr. D. Wyo. 1989)) (concluding, in chapter 11 case, that debtor's "songrights" asset of unknown value sufficiently scheduled the debtor's interest in his songs, which reverted to him upon confirmation of his plan). This court agrees that music compositions, like pending law suits, are examples of assets that may be listed as of "unknown value" in a bankruptcy schedule. *See id.; see also Vasquez v. Adair (In re Adair)*, 253 B.R. 85, 90 (9th Cir. B.A.P. 2000) (finding that debtors' lawsuit, valued at $20,000 but described as "speculative," reflected an unknown value and was not false and misleading). However, the value of a debtor's vested interest in most assets can be quantified, and a listing of "unknown amount" generally does not satisfy the disclosure requirements of the Bankruptcy Code. *Cf. In re Murray*, 238 B.R. 523, 529 (Bankr. E.D.N.Y. 1999) (finding that the value of a debtor's 401(k) plan can and should be quantified; allowing debtors to use "unknown amount" as a temporary entry, if petition was filed hurriedly, but requiring debtor and counsel to file amended schedules), *rev'd on other grounds*, 249 B.R. 223 (E.D.N.Y. 2000). Nevertheless, the court can determine value issues on a case-by-case basis, considering the circumstances. *See,*

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[3] The Marshall properties in fact were surrendered to the Marshalls. By its Order of June 20, 2002, this court found that the debtors did not have any equity in the real estate and that the properties were not necessary for the debtors' reorganization. It sustained the Marshalls' Motion for Relief from Stay and Abandonment with respect to those properties and the rents and profits therefrom. *See* R. 26, Case No. 02-31150.

e.g., *In re Adair*, 253 B.R. at 90 (stating that debtor with lawsuit asset was under no obligation to supplement schedules when the case settled because the cause of action had been abandoned by the trustee).

In this case, the debtors did not state a valuation of the Marshalls' properties, but did file a statement of intention declaring that they intended to surrender those properties to the Marshalls. The debtors reiterated their intention at the § 341 meeting. The court finds that the trustee recognized that the debtors, by surrendering the properties to the creditors, had no equity in the property and were leaving the creditors to determine the fair market value of the property through their disposal of the property. The trustee adjourned the § 341 meeting of the creditors without requesting an actual value of the assets. *See id.* at 91 ("The Trustee bore the burden of acting if he wanted further updated information about the [asset]."). Although this court believes that the debtors should have specified the value of those properties, it finds that the assets were clearly listed, the trustee did not request additional information from the debtors, and the property was abandoned to the creditors as both parties intended. The "listing was not so defective that it would forestall a proper investigation of the asset." *Cusano*, 264 F.3d at 946. The court will not now require the debtors to amend their schedules.

The court finds that the plaintiffs have not shown a loss or deficiency of real estate assets. The defendants identified the properties clearly; by stating that their value was "unknown," they did not state that the assets were valueless. *See In re Adair*, 253 B.R. at 89 (noting that the debtors' lawsuit was speculative but not valueless). The debtors did not conceal the assets. The court finds that the debtors' inability or failure to place a valuation on the property was not a failure to disclose.[4] It determines, therefore, that the plaintiffs have not

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[4] The court notes that the plaintiffs have conceded that "the equity in these [real estate] assets might well disappear in the course of the foreclosure actions." R. 27 at 16. Nevertheless, they maintained that "the value of the assets remaining available for unsecured creditors greatly exceeds the amount shown to be available in the LeVeques' schedules." *Id.* The court reminds the plaintiffs that, in a chapter 7 bankruptcy, the debts owed to unsecured creditors generally are discharged. As Judge Posner, then Chief Judge of the Seventh Circuit Court of Appeals, stated, "unsecured creditors usually get nothing in the Chapter 7 bankruptcy of an individual." *In re Hoskins*, 102 F.3d 311, 315 (7th Cir. 1996), *abrogated on other grounds by Associates Commercial Corp. v. Rash*, 520 U.S. 953, 964-65, 117 S. Ct. 1879, 1886, 138 L.Ed.2d 148 (1997); *see also In re Ekenasi*, 325 F.3d

(continued...)

presented to the court substantial and identifiable real property that was not available to the creditors. The plaintiffs have failed to establish a cause of action under § 727(a)(5) through this evidence.

2. Time-Share Week

The plaintiffs point out that the defendants failed to list in their schedules the time-share in a condominium on the island of Grand Cayman, which they valued at $8,500.[5] In their answer to requests for admission, the debtors denied that they were purchasing the time-share from the Marshalls. They stated: "We only had the right to use until all obligations were paid in full, and we had already defaulted on our obligations to the Marshalls." Def's Response to Pls' Request No. 75 for Admissions.[6]

In his affidavit, Mr. Marshall stated that the defendants were equitable owners of week 46 in Villa 50. He explained that he and his wife sold seven properties to the debtors by installment sale contracts. "As part and parcel of the deal whereby my wife and I sold these properties to the LeVeques, we also agreed to sell to them a time share week commonly referred to as Villa 50, week 46, at Plantation Village Beach Resort, Grand Cayman Island, for the duration of the term of the time share week ending on or about 2013." Defs' Ex. D, Affidavit of J. John Marshall, March 19, 2003, ¶ 14. He stated that the current market value of the time-share week was $8,500.[7] *See id.* ¶ 16.

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[4](...continued)
541, 547 (4th Cir. 2003) ("In a Chapter 7 case, the bankruptcy proceeding is short-lived and the debtor achieves a quick discharge of his unsecured, dischargeable debts.").

[5] The plaintiffs stated the value of the time-share week as $7,500 in their Request for Admissions and as $8,500 in their Memorandum in Support of Motion for Summary Judgment.

[6] The creditors first submitted to the debtors 99 requests for admissions; they supplemented the requests with two more requests for admissions on October 1, 2002 and December 4, 2002.

[7] The court gives little weight to Mr. Marshall's affidavit valuation of the market value of the time share week. He is competent to present a valuation, based on his personal eight-year involvement in the sales and purchases
(continued...)

The plaintiffs presented no legal arguments for their contention that the debtors' time-share week in their condominium was property of the debtors' estate. The court examined the "Agreement Relating to Time Share Condominium Week at Plantation Village Beach Resort, Grand Cayman Is., B.W.I.," executed by the plaintiffs and defendants on August 30, 1999. *See* Defs' Ex. G. It states that the Marshalls are the owners of that time-share and that they assigned to the LeVeques "the sole right to use said week for the period 1999 until such time as ... Marshall's ownership shall terminate as provided by the relevant documents and agreements in force (understood to be on or about 2013)." The LeVeques agreed to pay the annual maintenance fee and the electric bill, and also agreed to try to rent the week if they did not want to use it. However, the agreement pointed out: "note: rental of time share weeks is, strictly speaking, not allowed at Plantation Village." It then stated: "At such time as LeVeques shall have paid off all their financial obligations to Marshalls arising out of the March 1999 and August 1999 land contract transactions Marshalls shall transfer ownership of the subject time share week to LeVeques. The fee for registration in LeVeques[']s name (currently $150) will be paid by LeVeques."

The court, examining this agreement as it would any contract, has considered the nature of the agreement by reviewing its terms. In consideration for giving the defendants the right to use the plaintiffs' condominium for one week every year until 2013, the Agreement requires the debtors to pay a maintenance fee and the electric bill. It also requires them "to try to rent the week" if they will not use it, but warns them that rental is not strictly allowed. The court finds that the time-share agreement did not mention an initial price for the debtors' right to use the time-share or terms for payment. The LeVeques were not required to pay annual dues or insurance fees. They were given a week but had the right to change it to another week. The court finds no

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[7](...continued)
of time share weeks and in his business relationship with the broker at that property where he owns a time-share. However, the court finds that the plaintiff 's own self-interested affidavit declaration, without other evidence, does not rise to a proof of the value of the time-share week. *See* n.2, *infra; In re Hermanson*, 273 B.R at 549-50. The court will not base a denial of discharge on such a valuation.

indication in the language of the agreement that title or a property interest has been transferred. "Nothing more was given or to be given than the right to use the property on certain agreed terms." *Sombrero Reef Club, Inc. v. Allman (In re Sombrero Reef Club, Inc.)*, 18 B.R. 612, 618 (Bankr. S.D. Fla. 1982) (declaring that the time-share contracts in that case were not leases or contracts for the sale of real property, and were deemed to be executory contracts). The court notes, as well, that the costs for which the defendants were responsible were *de minimis*. It appears to the court that the week was a bonus to the defendants for purchasing seven land contracts. The court finds that the plaintiffs have failed to demonstrate to the court that the time-share is an unreported asset of the debtors' estate. It determines, therefore, that this evidence does not establish a cause of action under the exception to discharge found at § 727(a)(5).

3. South 5th Street Property

The plaintiffs alleged that, in February 2002, the debtors surrendered possession of the real estate on South 5th Street in Elkhart, Indiana. The debtors were purchasing the property on land contract from the Walkers. When they filed their voluntary petition on March 6, 2002, they did not list the transfer in their Statement of Financial Affairs. The plaintiffs placed a valuation of $55,000 on that property and asserted that the debtors had an equity of approximately $24,000 in the property at the time they surrendered possession of it. They argued that the court could reasonably infer that the transfer was made by the debtors with the intent to defraud their creditors or the trustee.

The debtors responded that they believed they did not own the property on South 5th Street and thus did not list it on their schedules. At the § 341 meeting, Mr. LeVeque agreed that he had entered into an agreement to purchase the property but stated that it was never recorded. He made only a couple of payments before defaulting, he said, and the contract then went back to the sellers. The debtors explained in their brief:

> Debtors failed to list this transfer in their schedules, not to defraud creditors, but because they did not think about it as a transfer of ownership interest. The failure to list the transfer of the contract was inadvertent, not intentional. Debtors had nothing to gain by failing to list it and, as required by

> 11 U.S.C. § 727(a)(5), they have explained the property to the trustee and he has entered a no asset report.

R. 32 at 3-4. In the plaintiffs' request for admissions, the debtors said that they purchased the 5th Street property for $35,000 on land contract from Steve Walker on October 30, 2000. They paid $3,000 down. Mr. LeVeque produced the promissory note and other relevant documents at the Rule 2004 examination. He testified that he had spent a lot of money rehabilitating the property and lost a lot of money by surrendering it to the Walkers and signing a letter release. He had tried to sell the house for $54,000, he testified, but no one even looked at it. The debtors did not believe the house could be worth $55,000, as the plaintiffs claimed. They explained that, in February 2002, when the Walkers discovered that the LeVeques were planning to file bankruptcy, the Walkers demanded that the LeVeques surrender possession of the real estate. The debtors admitted that they had defaulted on the contract and that they owed $31,000 when the Walkers took possession of the property. They insisted that they did not list it in their Statement of Financial Affairs because they had no interest in the property.

The court finds that debtors have a "duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate." *In re Yonikus*, 974 F.2d 901, 904 (7th Cir. 1992). However, they need not report property in which they hold no legal or equitable interest. *See United States v. McIntosh*, 124 F.3d 1330, 1335 (10th Cir. 1997). In this case, the debtors believed they had no interest in the property and the trustee, who was told about the South 5th Street real estate at the § 341 meeting, did not pursue the property or require the debtors to amend their schedules. The trustee is the real party in interest with respect to unscheduled property. *See Erickson v. Baxter Healthcare, Inc.*, 94 F.Supp.2d 907, 914 (N.D. Ill. 2000). His decision not to seek turnover of the property for the benefit of the creditors is indicative that he believed it was not property of the estate or that there was no value to be passed on to the creditors.

The court finds that the plaintiffs were unsuccessful in their burden of demonstrating that the debtors had failed to explain the loss of that asset. It is clear that the debtors gave a full and credible explanation of their surrender of the property to the Walkers. The trustee and creditors were aware of the transfer. There was no

concealment of ownership and no evident reason for the debtors to conceal the surrender. Despite the plaintiffs' suggestion that the defendants held $24,000 in equity in this real estate, the court finds that there was no actual evidence of current market value presented by any party. The court determines that the plaintiffs' allegation concerning the South 5th Street property does not require a denial of the debtors' discharge.

4. Pension Fund

The creditors listed, as part of the debtors' personal property, the value of the Teamsters Pension Fund as $19,739. The debtors had stated that the amount in that fund was unknown and was excluded from their bankruptcy estate. Although there is no evidence in this record that the debtors' pension plan was an Erisa-qualified one, it is clear that a "debtor's interest in an Erisa-qualified pension plan may be excluded from the property of the bankruptcy estate under § 541(c)(2)." *Patterson v. Shumate*, 504 U.S. 753, 765, 112 S. Ct. 2242, 2250, 119 L.Ed.2d 519 (1992). The court does not condone the debtors' disinclination to disclose the values of their assets. Nevertheless, it finds that the debtors listed the pension plan as an asset, and that the plaintiffs have not demonstrated any losses or deficiencies in that asset for which the debtors are obligated to provide an explanation. The debtors' discharge will not be denied on the basis of the "unknown" valuation of the debtors' pension fund.

5. Assets of No Value

The debtors reported that the following assets had a "0" valuation; however, the plaintiffs claimed that the assets did have value, and they listed the values thus:

(a) accounts receivable	$3,400.00
(b) liquidated debts, judgments	25,750.66
(c) tax refunds	2,682.00
(d) receiver's accounts (net)	9,709.03
(e) receiver's judgments	7,306.33

R. 27 at 13. The plaintiffs asserted that "a significant portion of the understatement is due to the Leveques' omissions to report in their schedules . . . their interest in accounts receivable from tenants, the judgments owed by them, the tax refunds they had coming, their interests as cestui que trust in the monies held by the receiver in two foreclosure actions and in judgments recovered by the receiver against tenants, and their understatement of the values of their vehicles." *Id.* at 14. The debtors presented responses for each category. They considered the accounts receivable and judgments for unpaid rent to have no value because they were not collectible. The debtors explained, at the § 341 meeting and Rule 2004 examination, that the former tenants did not make their payments, despite the judgments against them, and that their whereabouts were unknown. They went into detail with respect to each tenant and produced documentation. The court found their explanations satisfactory and credible; moreover, it appears to the court that the trustee found their explanations believable, as well, for he did not pursue those assets for the benefit of the creditors. With respect to a reported receipt of no tax refunds, the debtors responded that they did not expect to receive any refunds, because they owed taxes. However, they did receive the refund of $426 from the state of Indiana, and turned it over for distribution to creditors. They made clear, as well, that any rents or judgment payments that had been collected by the receiver were being held for the Marshalls, not for the debtors.

The court finds that the plaintiffs properly challenged the debtors' reporting of "0" value for certain assets; however, the debtors gave adequate justifications for having claimed that they had no assets in those categories. The burden then shifted back to the plaintiffs to disprove the debtors' reasons. *See First Federated Life Ins. Co. v. Martin (In re Martin)*, 698 F.2d 883, 887 (7th Cir. 1983). The court determines that the plaintiffs have not demonstrated that the debtors' responses were inadequate to explain the loss of, or inability to claim, those assets. In fact, the plaintiffs themselves stated that they have shown "the total value of the LeVeques' assets that might, under ideal circumstances, be made available for payment of the debts owed to unsecured creditors." R. 27 at 17 (emphasis added). The court agrees that, under ideal circumstances, the tenants would

have paid the debtors and those assets would be available for the debtors' unsecured creditors. But it finds credible the debtors' sworn testimony that the tenants have not paid and that those assets are uncollectible. The court finds that the debtors' discharge will not be denied on these grounds.

6. Vehicles

The plaintiffs contended that the debtors undervalued their vehicles. On February 19, 2003, the court held an evidentiary hearing on the valuation of the defendants' four vehicles. Each of the debtors testified, and Bill Adams, who owns Bill's Auto Repair in Elkhart, testified on behalf of the creditors. After hearing their testimony and reviewing the exhibits admitted at the hearing, the court summarized the witnesses' opinions concerning the worth of the vehicles. The court found the witnesses truthful and credible, but noted that their valuations were quite different. Based on their testimony and the valuation evidence before it, the court found that the evidence was sufficient to establish that the vehicles, as of the date of the debtors' bankruptcy petition, had the following values:

1992 Ford Explorer, $3900
1990 Ford F-150, $1,000
1993 Ford F-150, $6,000
1999 Jeep Grand Cherokee, $15,000

Although these values are higher than the ones presented by the debtors, the court does not find that the debtors failed to give a satisfactory explanation for the lower valuation. Mr. LeVeque testified to the condition of each vehicle, the amount of money he had spent fixing each one, and the reasons he believed the values were lower. The court finds that the debtors' discharge will not be denied based on their valuation of the vehicles.

7. Other Assets

The plaintiffs made other allegations of omitted or understated assets by the debtors.[8] In none of the allegations, the court finds, did the plaintiffs sufficiently allege that *substantial* assets had disappeared that could have been available for creditors, or that assets were listed at a lower figure than the debtors had previously alleged that they were worth. *See Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 364 (Bankr. N.D. Ill. 2002) (requiring that plaintiff show that "the debtor at one time owned substantial and identifiable assets that are no longer available for his creditors"); *Ernst v. Walton (In re Walton)*, 103 B.R. 151, 155 (Bankr. S.D. Ohio 1989) (requiring, for prima facie case, a showing "that a debtor has listed assets in his schedules at a lower figure than he has previously presented himself to be worth"). Rather, the plaintiffs raised differences in the valuations of the assets in order to establish that the assets had greater value than the debtors stated and that such value might inure to the benefit of the creditors.

In these circumstances, the court gives much weight to the determinations of the chapter 7 trustee, who is the representative of the debtor's unsecured creditors and has a fiduciary obligation to them. *See Dechert v. Cadle Co.*, 333 F.3d 801, 804 (7th Cir. 2003). He is required to collect estate property, to investigate the financial affairs of the debtor, and to oppose the debtor's discharge, if the evidence warrants it. *See* 11 U.S.C. § 704; *In re Melenyzer*, 140 B.R. 143, 156 (Bankr. W.D. Tex. 1992) ("A trustee bears liability for the value of any assets which he fails to bring into the estate, if such failure constitutes a breach of his duty to collect the assets of the estate.") (citing cases). In this case, the experienced chapter 7 trustee conducted a § 341 meeting and made reasonable inquiries about the debtors' assets for the benefit of the creditors. He decided there was no point in trying to collect real estate, rents, judgments, or other putative assets to administer for distribution to the unsecured creditors. Having considered the trustee's decisions, the court finds that no assets of substantial

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[8] For example, the plaintiffs alleged that on June 4, 2001, the debtors received $2,309.32 from their insurance company for the loss of stolen tools, but failed to list those proceeds on their schedules. The debtors responded that they spent the insurance money to replace some of the tools, but that they actually could not replace them in value, because the tools had been handed down from Mr. LeVeque's grandfather. The court finds the debtors' failure to report this information sloppy but not worthy of a denial of discharge.

size were omitted or understated by the debtors. Moreover, it finds that the debtors provided satisfactory, specific explanations concerning all their assets. The court determines that the § 727(a)(5) denial of discharge does not apply to the facts of this case.

8. Other issues: Fraudulent Intent, Burden of Proof

The plaintiffs brought their objection to the debtors' discharge specifically under § 727(a)(5). However, in their brief in support of summary judgment, they alleged that the debtors concealed or omitted some assets with fraudulent intent, and cited to §§ 727(a)(2) and (a)(4). The plaintiffs presented no argument under those subsections of § 727. In order to succeed on a § 727(a)(2) objection to discharge, the plaintiffs must prove that the debtor, with intent to defraud a creditor, had transferred his property within one year before filing his petition in bankruptcy. *See Village of San Jose*, 284 F.3d at 791. To bar discharge, the plaintiffs must prove both that there was a transfer or concealment of property and an improper intent. *See In re Kontrick*, 295 F.3d 724, 736 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 1899 (2003). In order to succeed on a § 727(a)(4) objection, the plaintiffs must prove that the debtors knowingly and fraudulently made a false oath or account. *See In re Bostrom*, 286 B.R. at 359. The court, having reviewed this record thoroughly, reading the transcripts from the § 341 meeting and the Rule 2004 examination and examining all documents submitted by the parties, has found no evidence in this case of the debtors' intent to deceive the creditors or the trustee. The plaintiffs have failed to demonstrate, by direct or circumstantial evidence, the debtors' fraudulent intent – a necessary element of §§ 727(a)(2) and (a)(4).

The plaintiffs also have failed in their burden of proof under § 727(a)(5). To succeed in their summary judgment motion, the plaintiffs had the initial burden of showing "that the evidence in the record would not permit the nonmovant to carry its burden of proof at trial." *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998) (*citing Celotex v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2554, 91 L.Ed.2d 265 (1986); Fed. R. Civ. P. 56(c)). In order to make their prima facie case in a § 727(a)(5) objection to discharge, the plaintiffs were

required to show the debtors' failure to explain the loss or deficiency of specific assets. They "must prevail on two issues, however: the disappearance of substantial assets and a lack of a satisfactory explanation for this disappearance." *First Commercial Fin. Group, Inc. v. Hermanson (In re Hermanson)*, 273 B.R. 538, 546 (Bankr. N.D.Ill. 2002). If the prima facie case was successful, the burden of proof then shifted to the debtors to respond by producing additional evidence and satisfactory explanations supported by documentation. If the debtors were successful, at that point the burden again shifted, and "the ultimate burden of proof in a proceeding objecting to a discharge lies with the plaintiff." *In re Martin*, 698 F.2d at 887; Fed. R. Bankr. P. 4005, Editors' Comment. The court found, *infra*, that the real estate of "unknown value" was clearly declared in the plaintiffs' schedules and was not valueless; it rejected the plaintiffs' self-serving current market value figures and concluded that these assets were available for the benefit of creditors, and in fact were surrendered to the plaintiffs. The court also found that the plaintiffs did not prove that the time share and the pension funds were property of the debtors' estate. With respect to this evidence, therefore, the court now finds that the plaintiffs failed in their initial burden of demonstrating substantial, identifiable property of the debtors' estate that was not available to the creditors. *See In re Bostrom*, 286 B.R. at 364.

The court also finds that, when the burden shifted to the debtors, their answers were "sufficient to 'eliminate the need for the court to speculate as to what happened to all the assets.'" *In re Bostrom*, 286 B.R. at 365; *see also Heinecke v. Ryan (In re Ryan)*, 285 B.R. 624, 632 (Bankr. W.D. Pa. 2002) (finding debtors' explanation satisfactory, denying § 727 denial of discharge); *D.A.N. Joint Venture v. Cacioli (In re Cacioli)*, 285 B.R. 778, 784 (Bankr. D. Conn. 2002) (finding debtor carried his burden and plaintiff failed to establish cause of action under § 727(a)(5)). The debtors provided satisfactory, credible explanations for the disposition of their assets. Moreover, the court finds that they presented "a good faith explanation of what really happened to the assets in question." *Id. (citing Olson v. Potter (In re Potter)*, 88 B.R. 843, 849 (Bankr. N.D.Ill.1988)) . The

court is "convinced of the truth of the [debtors'] explanation of what happened to [their] assets." *In re D'Agnese*, 86 F.3d 732, 735 (7th Cir. 1996) (citations omitted).

The court determines that the creditors have failed in their ultimate burden of persuasion. Once the debtors satisfactorily demonstrated, with corroborative records, what happened to their assets and showed that none of the assets had disappeared, the plaintiffs were required to overcome the debtors' explanations. They did not provide evidence to rebut the debtors' explanations or to validate that there was a dissipation or loss of the debtors' assets. Of the $739,137.02 in assets claimed by the plaintiffs to be unreported or under-reported by the debtors, they failed to prove more than $700,000 of those assets. The court concludes, therefore, that the plaintiffs have failed to establish a cause of action under 11 U.S.C. § 727(a)(5).

The court finds that there are no genuine issues of material fact in dispute. It denies the plaintiffs' summary judgment as a matter of law and denies the plaintiffs' objection to the debtors' discharge.

Conclusion

For the reasons presented in this Memorandum of Decision, the court determines that there are no issues of material fact regarding the plaintiffs' Objection to Discharge of Debtors and that the parties are entitled to a summary judgment as a matter of law. The plaintiffs did not successfully shoulder their initial and ultimate burdens of proof. The court denies the plaintiffs' Motion for Summary Judgment.

The court further finds that the plaintiffs have not presented to the court a factual basis upon which the court would base a denial of the debtors' discharge. They failed to show the disappearance or diminution of substantial assets and a lack of satisfactory explanation from the debtors. The court concludes that the facts of this case do not warrant denying the debtors a discharge pursuant to 11 U.S.C. § 727(a)(5). Therefore, the court denies the plaintiffs' Objection to Discharge of Debtors. The Clerk is ordered to administer the debtors' case to discharge in the normal fashion.

SO ORDERED.

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT